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9
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12
13 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

14 MARC COHODES,

15 Plaintiff,

16 vs.

17 MIMDEX GROUP, INC., DERRICK
18 SNOWDY, and DANIEL GUY.

19 Defendants.

20 **CASE NO. 3:22-cv-00368-JD**

21 **NOTICE OF MOTION AND SPECIAL
MOTION TO STRIKE PORTIONS OF
PLAINTIFF'S COMPLAINT PURSUANT TO
C.C.P. § 425.16; AND REQUEST FOR
ATTORNEYS' FEES AND COSTS (C.C.P. §
425.16(c)(1))**

22 [Declarations of Derrick Snowdy and El'ad
23 Botwin; Request for Judicial Notice; and
24 [Proposed] Order Filed Concurrently Herewith]

25 Date: July 21, 2022

26 Time: 10:00 a.m.

27 Ctrm: 11

28 Assigned to the Hon. James Donato

SPECIAL MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT PURSUANT TO
C.C.P. § 425.16; AND REQUEST FOR ATTORNEYS' FEES

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that, on July 21, 2022, at 10:00 a.m., or as soon thereafter as the
3 matter may be heard before the Honorable James Donato, in Courtroom 11 of the United States
4 District Court for the Northern District of California, located at Phillip Burton Federal Building, 450
5 Golden Gate Avenue, 19th Floor, San Francisco, California 94102, Defendant Derrick Snowdy
6 (“Snowdy”) will, and hereby does, move this Court, pursuant to California Code of Civil Procedure
7 section 425.16, for an order striking the Third and Fourth Causes of Action against them in the
8 Complaint filed by Plaintiff Marc Cohodes (“Plaintiff” or “Cohodes”), and striking the allegations on
9 which the claims are based.

10 Section 425.16, known as the “anti-SLAPP” statute, is a means to quickly dispose of causes
11 of action arising from a defendant’s exercise of his constitutional right to petition for redress of
12 grievances and applies against state law claims asserted in federal court. *See, Thomas v. Fry’s Elecs.,*
13 *Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005). The anti-SLAPP analysis is a two-prong inquiry: (1)
14 the defendant must show that the claims arise from protected activity; and (2) the burden then shifts
15 to the plaintiff to produce admissible evidence to demonstrate a probability of prevailing on the merits
16 of the claims. *Baral v. Schnitt* (2016) 1 Cal. 5th 376, 384.

17 In the case at bar, the alleged conduct and communications in support of Cohodes’ defamation
18 and false light causes of action constitute protected activity that falls squarely under California’s
19 litigation privilege, California Code of Civil Procedure § 425.16(e) and California Civil Code § 47(b).
20 The statements complained of also constitute protected speech in connection with an “issue of public
21 interest” under California Code of Civil Procedure § 425.16(e)(3)-(4), and are also protected under
22 the common interest privilege, pursuant to California Code of Civil Procedure § 47(c). Cohodes
23 cannot show malice to overcome the latter two privileges, and the litigation privilege is absolute and
24 cannot be overcome by malice.

25 Because the challenged claims arise from protected activity, the burden shifts to the Plaintiff
26 to demonstrate a probability of success on his claims. The communications Cohodes’ complains of

1 leading up to certain lawsuits are “connected” and “logically related” to judicial actions and are
2 absolutely privileged.

3 Pursuant to section 425.16(c)(1), Snowdy is entitled to recover the attorneys’ fees and costs
4 incurred in connection with the Motion.

5 The Motion is based on this Notice, the attached Memorandum of Points and Authorities, the
6 Declarations of Derrick Snowdy and El’ad Botwin, the Request for Judicial Notice and exhibits
7 thereto, all pleadings and papers on file in this action, any oral argument the Court may entertain on
8 the Motion, and any other matter the Court deems just and proper.

9 DATED: June 15, 2022

Respectfully Submitted,

10 SANCHEZ-MEDINA, GONZALEZ,
11 QUESADA, LAGE, GOMEZ & MACHADO, LLP

12

13 By: *s/Gustavo D. Lage*
14 Gustavo D. Lage

15 Attorneys for Defendant
16 DERRICK SNOWDY

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Far from the pristine image he paints of himself in the Complaint, Plaintiff Marc Cohodes’ (“Cohodes”) track record as a short seller is not unsullied. California courts have found in 2007, upon reviewing extensive evidence, that Cohodes methodically caused false information to be published about a company he was shorting. *See, Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal. App. 4th 688 (Exhibit A). Cohodes also went “too far” in his attacks against Defendant MiMedx Group, Inc., according to Bloomberg, and to this day, the majority of Cohodes’ inflammatory accusations were never charged, let alone proven.¹ Cohodes now brings this classic SLAPP suit to silence his critics and chill further investigations into his conduct.

By Cohodes' own inescapable allegations, the conduct he complains of directly relates to the pending or anticipated litigation. Cohodes' defamation and false light claims thus arise from privileged activity and should be stricken. The litigation privilege must be "broadly" interpreted, *People ex rel. Gallegos v. Pac. Lumber Co.* (2008) 158 Cal. App. 4th 950, 958, and any doubts must be "resolved in favor of applying it." *Kashian v. Harriman* (2002) 98 Cal. App. 4th 892, 913. It is absolute and applies regardless of malice. *Id.* For analogous reasons, Cohodes is unable to show that he is likely to prevail on his defamation and false light claims. "The litigation privilege is also relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." *TP Link USA Corp. v. Careful Shopper LLC*, 2020 WL 3063956, at *8 (C.D. Cal. Mar. 23, 2020).

II. STATEMENT OF ISSUES TO BE DECIDED

1. Do the allegations of the Third and Fourth Causes of Action arise from protected activity within the meaning of California Code of Civil Procedure §426.15, because it is related to judicial proceedings, as alleged by Plaintiff, making it absolutely immune from tort liability by the litigation privilege pursuant to California Civil Code §47(b)?
2. Do the defamation and false light claims also arise from protected speech in connection with an “issue of public interest” under California Code of Civil Procedure §425.16(e)(3)-(4)?

¹ Exhibit B; see, *Petit*, 2021 WL 673461.

1 3. Do the defamation and false light claims also arise from protected speech under the common
 2 interest privilege pursuant to California Civil Code §47(c)?
 3 4. Did Plaintiff fail overcome the latter two privileges by an adequate showing of malice?
 4 5. Can Plaintiff show a probability of prevailing on his claims under the second prong of the
 5 anti-SLAPP analysis?

6 **III. STATEMENT OF RELEVANT FACTS**

7 Plaintiff Marc Cohodes is a short seller who claims to be “a successful investor [who] ... can
 8 identify companies that are overvalued or may be conducting fraudulent or otherwise illegal
 9 activities.” DE1, at ¶132. On January 19, 2022, Cohodes filed suit against Defendants MiMedx
 10 Group, Inc. (“MiMedx”), Snowdy, and Daniel Guy (“Guy”), alleging causes of action for Violation
 11 of the California Invasion of Privacy Act under California Penal Code § 632.7 (against all
 12 Defendants); Violation of the Wiretap Act (18 U.S.C. § 2511) (against all Defendants);
 13 Defamation/Slander under California Civil Code § 46 (against Snowdy and Guy); False Light
 14 Invasion of Privacy (against Snowdy and Guy); Trespass (against Snowdy). Cohodes alleges unjust
 15 enrichment against Snowdy and seeks injunctive relief against all Defendants. DE1.

16 Cohodes alleges that MiMedx and Guy² each conspired with Snowdy, a private investigator, to
 17 gain Cohodes’ trust and spy on him during ongoing related and anticipated legal battles. *Idib.* More
 18 specifically, Cohodes alleges that Guy’s hedge fund owned shares in Concordia Healthcare, a stock
 19 Cohodes was shorting, and that Guy suspected that short sellers were behind the decline in
 20 Concordia’s stock. DE1, at ¶¶18-21. Cohodes alleges that Guy hired Snowdy to spy on Cohodes,
 21 including by allegedly recording their phone conversations, and that he gained Cohodes’ trust under
 22 the pretense that he was also adverse to Concordia. DE1, at ¶¶22-30. The Complaint alleges that Guy
 23 made false statements about Cohodes to Newton Glassman, a principal of Catalyst Capital Group (a
 24 Canadian hedge fund), and Callidus Capital (a lending company), which was “planning to file a
 25 lawsuit against the short sellers and others that were supposedly manipulating its securities.” DE1, at
 26 ¶¶31-37. Cohodes alleges that Guy and Snowdy fed false and defamatory information about Cohodes

27
 28

 2 Guy “is the Chief Investment Officer and Director of Harrington Global, a hedge fund that lost
 money by investing in an [allegedly] overvalued company that Cohodes exposed.” DE1, at ¶4.

1 to the Catalyst/Callidus legal team and tried to “shop” Snowdy’s allegedly recorded phone
 2 conversations to them in preparation for the litigation against short sellers. DE1, ¶¶ 38-59.

3 Cohodes also alleges that MiMedx, a company Cohodes publicly accused of fraud and other
 4 wrongdoing, DE1, at ¶¶ 60-61, sued Sparrow Fund Management LP (“Sparrow”) for stock
 5 manipulation over an article it believed was published by Sparrow and that MiMedx later dismissed
 6 the action because “MiMedx conceded that neither Sparrow nor its principals” published the article.
 7 DE1, at ¶¶ 62-63. Cohodes alleges that an anonymous email was sent to MiMedx expressing support
 8 for its lawsuit and allegedly implicating Cohodes in connection with the Sparrow litigation, and that
 9 the sender was Snowdy “[o]n information and belief....” DE1, at ¶64. The Complaint alleges that
 10 MiMedx published articles and posts on its website, attacking Cohodes, which, Cohodes conjectures,
 11 were in part based on Snowdy’s alleged findings based on documents unsealed in the Sparrow-
 12 MiMedx litigation, but Cohodes also alleges that Snowdy was retained by MiMedx much later. DE1,
 13 at ¶¶65-66, 68; DE1-1. Only days after Snowdy’s alleged retention, MiMedx published another article
 14 wherein it stated its beliefs about Cohodes, mirroring its beliefs as reflected in the retention email
 15 Cohodes attached as Exhibit A to the Complaint. DE1-1; DE1, at ¶72. Cohodes alleges that Snowdy
 16 attempted to shop “illicitly obtained recordings” of Cohodes to parties adverse to Cohodes. DE1, at
 17 ¶¶66-85.

18 In 2020, two MiMedx executives were convicted of one count of securities fraud count and one
 19 count of conspiracy and sentenced to one year imprisonment respectively. DE1, ¶¶5-6; *United States*
 20 v. *Petit*, 2021 WL 673461, at *11 (S.D.N.Y. Feb. 21, 2021). Many of Cohodes’ public accusations
 21 against MiMedx were never brought or proven against it or its executives. Exhibit B. In another
 22 matter, a California appellate court affirmed a trial court’s findings that competent evidence showed
 23 that Cohodes intentionally caused false statements to be published about a company his hedge fund
 24 was shorting and caused the decline of its stock. *Overstock.com, Inc. v. Gradient Analytics, Inc.*
 25 (2007) 151 Cal. App. 4th 688, 710-12 (Exhibit A).

26 Snowdy now brings this Motion to Strike Cohodes’ defamation and false light causes of action,
 27 and files a Motion to Dismiss concurrently herewith.
 28

1 **IV. LEGAL STANDARD**

2 Under California law, “[a] cause of action against a person arising from any act of that person in
 3 furtherance of the person’s right of petition or free speech . . . in connection with a public issue shall
 4 be subject to a special motion to strike, unless the court determines that the plaintiff has established
 5 that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code §
 6 425.16(b)(1). Courts in this Circuit apply the anti-SLAPP statute in diversity actions. *See, Planned*
 7 *Parenthood Fed’n of Am., Inc. v. Ctr. For Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018); *Thomas*
 8 *v. Fry’s Elecs., Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005).

9 The anti-SLAPP analysis has two prongs. *First*, the defendant must make a *prima facie* showing
 10 that the claims “arise from” protected activity; namely, “any act of that person in furtherance of the
 11 person’s right of petition or free speech under the United States Constitution or the California
 12 Constitution in connection with a public issue.” Cal. Civ. Proc. Code § 425.16(b)(1). *Second*, “[i]f
 13 the defendant meets this initial burden, the burden then shifts and the plaintiff must show a probability
 14 of prevailing on the claim.” *Contemp. Servs. Corp. v. Staff Pro Inc.* (2007) 152 Cal. App. 4th 1043,
 15 1052. The plaintiff must present competent, admissible evidence to overcome the defendant’s
 16 privileges and defenses. *See, Comstock v. Aber* (2012) 212 Cal. App. 4th 931, 953.

17 “[A] plaintiff cannot use an eleventh-hour amendment to plead around a motion to strike under
 18 the anti-SLAPP statute,” *Navellier v. Sletten* (2003) 106 Cal. App. 4th 763, 772, nor can he amend
 19 his complaint after it is stricken pursuant to section 425.16, *Simmons v. Allstate Ins. Co.* (2001) 92
 20 Cal. App. 4th 1068, 1073-74.

21 **ARGUMENT**

22 **V. PRONG ONE: COHODES’ CLAIMS AGAINST SNOWDY ARISE FROM
 23 PROTECTED ACTIVITY.**

24 **A. California’s Litigation Privilege Bars the Third and Fourth Causes of
 25 Action.**

26 By Cohodes’ admissions, the defamation and false light invasion of privacy causes of action³
 27 are based solely on statements Snowdy allegedly made to attorneys in anticipation of litigation. *See*

28 ³ “When a false light claim is coupled with a defamation claim, the false light claim is essentially
 29 superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of
 30 action.” *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1385, fn. 13. Consequently, the

1 DE1, e.g., at ¶ 118, ¶ 125 (alleging that, when Snowdy allegedly met with Catalyst's legal team,
 2 "Catalyst was preparing to file lawsuits against investors claiming that those investors had illegally
 3 manipulated the shares of Callidus"), ¶ 130, ¶ 135 (same). Because the application of the litigation
 4 privilege can be gleaned from the complaint, "the applicability of the litigation privilege is a question
 5 of law." *Kashian v. Harriman* (2002) 98 Cal. App. 4th 892, 913 (citing *Rothman v. Jackson* (1996)
 6 49 Cal.App.4th 1134, 1139–1140). California's litigation privilege, which is embodied in California
 7 Civil Code § 47(b), is absolute and applies regardless of whether the communication was made with
 8 malice or the intent to harm. *Id.*, at 912. This privilege "afford[s] litigants and witnesses the utmost
 9 freedom of access to the courts without fear of being harassed subsequently by derivative tort
 10 actions[.]" and "plays a key role in ensuring that the channels used to 'investigate and remedy
 11 wrongdoing' remain open and unimpeded." *TP Link*, 2020 WL 3063956, at *8–9 (citing *Flatley v.*
 12 *Mauro* (2006) 39 Cal. 4th 299, 321; *Kashian*, 98 Cal. App. 4th at 926). "Although originally enacted
 13 with reference to defamation, the privilege is [given a broad application and] now held applicable to
 14 any communication, whether or not it amounts to a publication, and all torts except malicious
 15 prosecution." *Id.* (citing *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 212).

16 "The usual formulation is that the privilege applies to any communication (1) made in judicial
 17 or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve
 18 the objects of the litigation; and (4) that have some connection or logical relation to the
 19 action." *Id.* (citation omitted). "Thus, communications with *some* relation to judicial proceedings are
 20 absolutely immune from tort liability by the litigation privilege." *Id.* (emphasis added)
 21 (citing *Rusheen v. Cohen* (2006) 37 Cal. 4th 1048, 1057). "It is not limited to statements made during
 22 a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards" and "is
 23 applicable to communications between private parties." *Id.* (citing *Dove Audio, Inc. v. Rosenfeld,*
 24 *Meyer & Susman* (2006) 47 Cal. App. 4th 777, 781-83). "California courts have adopted "a fairly
 25 expansive view of what constitutes litigation-related activities within the scope of section 425.16.""

26
 27 arguments advanced in this motion equally apply to both the third and fourth causes of action. In addition to
 28 these arguments under the anti-SLAPP statute, Snowdy raises independent grounds for dismissal of these
 causes of action in the motion to dismiss, filed separately.

¹ *Hann v. Anderson*, 2021 WL 1820697, at *12 (C.D. Cal. Mar. 16, 2021), *report and recommendation*
² *adopted*, 2021 WL 1814976 (C.D. Cal. May 4, 2021) (citing *Kashian*, 98 Cal. App. 4th at 908).

³ Cohodes tries to save his causes of action by alleging that “Snowdy’s statements were
⁴ unprivileged. The lawyers to whom Snowdy made the statements were Catalyst’s lawyers, not
⁵ Snowdy’s, and no privilege applies to Snowdy’s false statements.” DE1, at 28, ¶123. The relevant
⁶ question, however, is whether the alleged statements were made in connection or logical relation to
⁷ litigation by a participant. California courts have extended California’s litigation privilege to
⁸ communications by private investigators and other agents working with attorneys in preparing for
⁹ litigation. *See, e.g., Steel v. City of San Diego*, 2010 WL 11468534, at *8 (S.D. Cal. Jan. 4, 2010)
¹⁰ (granting investigator’s motion to strike complaint under litigation privilege); *Kerner v. Superior Ct.*
¹¹ (2012) 206 Cal. App. 4th 84, 122, *as modified* (May 21, 2012) (finding “that the hiring
¹² of private investigators was protected by the privilege regardless of whether it constituted
¹³ communicative or noncommunicative conduct.”); *Rubin v. Green* (1993) 4 Cal. 4th 1187, 1195
¹⁴ (extending litigation privilege to attorney’s agents and noting that “we can imagine few
¹⁵ communicative acts more clearly within the scope of the privilege than … meeting and discussing”
¹⁶ with attorneys anticipated litigation).⁴ Even if this Court found that the question whether the litigation
¹⁷ privilege applies to communications with private investigators in anticipation of litigation, “[a]ny
¹⁸ [such] doubt about whether the privilege applies [must be] resolved in favor of applying it.” *Kashian*,
¹⁹ 98 Cal. App. 4th at 913 (citing *Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529).

²⁰ Cohodes’ next inference that the litigation privilege does not apply because Snowdy’s
²¹ representations are alleged to be “false,” DE1, at 28, ¶123, is just as futile because, “as an ‘absolute’

²² ⁴ Courts in other jurisdictions have also readily held (including in relying on California cases), that
²³ “statements made by participants in judicial proceedings extends to statements made by private investigators
²⁴ employed by the parties or their representatives” and are thus absolutely privileged. *Hawkins v. Harris*, 141
²⁵ N.J. 207, 211, 220 (1995) (citing *Silberg*, 50 Cal.3d 205). The *Hawkins* court reasoned, for example, that an
²⁶ attorney is professionally responsible to supervise such investigators. *Id.*, at 221. *See also, Leavitt v.*
²⁷ *Bickerton*, 855 F.Supp. 455, 458 (D.Mass.1994) (holding that, for private investigator’s statements to be
²⁸ privileged, they “need only be made in the course of judicial proceedings and be, in some way, related to those
proceedings.”); *Middlesex Concrete Prod. & Excavating Corp. v. Carteret Indus. Ass’n*, 68 N.J. Super. 85, 92
(App. Div. 1961) (holding that the litigation privilege “extends to statements or communications in connection
with a judicial proceeding” and thus “protects [for example] a person while engaged in private conferences
with an attorney with reference to litigation.”) (citing Restatement (First) of Torts § 588 (1938); Prosser on
Torts § 95 (2d ed. 1955)).

privilege, California's litigation privilege is not subject to qualification based upon the subjective motives or alleged bad faith of a party making a challenged communication." *TP Link*, 2020 WL 3063956, at *9 (granting anti-SLAPP motion and holding that "[counterclaimants] cannot avoid the litigation privilege by alleging that [counterdefendant] engaged in knowingly false, prelitigation communication") (citing *Mansell v. Otto* (2003) 108 Cal. App. 4th 265, 277 n.47). "Even fraudulent, deliberately false, or other types of tortious communication *must* be susceptible to coverage by the litigation privilege; if that were not true, the privilege would be unable to achieve its purpose of ensuring that fear of being subjected to derivative tort suits does not prevent open communication and the 'utmost freedom of access to the courts' and other channels of redress." *Id.* (emphasis in original). *Cf., Welk Resort Grp. Inc. v. Reed Hein & Assocs., LLC*, 2019 WL 1242446, at *8 (S.D. Cal. Mar. 18, 2019) (granting anti-SLAPP motion based on litigation privilege despite allegation that attorneys engaged in unlawful conduct and made false statements at variance with the Rules of Professional Conduct).⁵

B. This Case Involves Speech in Connection with an Issue of Public Interest.

To the extent Cohodes alleges a disclosure to a public forum, the alleged conduct is also protected as speech in connection with an "issue of public interest" under section 425.16(e)(3)-(4). An "issue of public interest" is "any issue in which the public is interested." *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal. App. 4th 1027, 1042 (emphasis in original). "California law does not require a statement to be serious or truthful in order to concern an issue of public interest." *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 969 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015).

Short sellers, such as Cohodes, take a significant risk in betting against a company, because their potential losses can be limitless, given that a short position can "leave[] an investor open to the possibility of unlimited losses, since a stock can theoretically keep rising indefinitely." Exhibit C,

⁵ Analogously, the "interest of justice" test has long been rejected under California's litigation privilege as "a drastic departure from precedent and largely destructive of the principal purpose of the litigation privilege. ... It would permit derivative tort suits in many, if not most, cases on the ground that an otherwise privileged communication was not made for the purpose of promoting justice, a charge easily and quickly made by an adversary." *Kashian*, 98 Cal. App. 4th at 918-19 (citations omitted).

1 Securities and Exchange Commission, *Key Points About Regulation SHO*. As a result, short sellers
 2 are oftentimes suspected of (and found to be involved in) “short and distort” scams. Indeed, Cohodes
 3 is not the flattering self-portrait he paints for this Court, e.g., DE1, at ¶132. At least two California
 4 courts have found, based on competent evidence, that Cohodes sought to make facts about a company
 5 his entities were holding short positions in to “appear more negative,” and caused to publish baseless
 6 “defamatory statements” that Cohodes and his co-conspirators “supplied” “in reckless disregard of the
 7 truth,” based on a “rigged” business model “for the purpose of negatively influencing the price of
 8 Overstock shares so [he and his company] could profit from short positions in Overstock shares.”
 9 *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal. App. 4th 688, 710-12 (Reardon, J.,
 10 issuing a lengthy opinion affirming the trial court’s findings); attached hereto as Exhibit A. Cohodes’
 11 hedge fund settled the case for \$5 million. Exhibit E.

12 Even in connection with MiMedx, though two of its former executives were convicted on a
 13 securities fraud count and a conspiracy count and sentenced to one year respectively,⁶ there is no
 14 genuine dispute that Cohodes went “too far” in his attacks against MiMedx, as reported by
 15 Bloomberg. Exhibit B. Though that article was released just prior to the issuance of the indictment,
 16 the majority of Cohodes’ inflammatory accusations were never brought as charges against MiMedx
 17 or its executives, let alone proven. *Id.* (accusing MiMedex, *inter alia*, of “Medicare fraud,
 18 endangering patient safety, evidence destruction, extortion, rape and sexual harassment, influence
 19 peddling, … and bribery”). Cohodes now brings this classic SLAPP suit with the intent of silencing
 20 public criticism of him and to intimidate anyone who wishes to investigate him.

21 Potentially abusive short and naked short selling practices have long been the subject of public
 22 and governmental concern. The Securities and Exchange Commission recently exposed another
 23 “short and distort” scheme. *See, Sec. & Exch. Comm’n v. Lemelson*, 2022 WL 952264, at *3 (D. Mass.
 24 Mar. 30, 2022). Certain unlawful trading practices, such as naked short selling, are difficult to
 25 investigate, even by government officials. *See, e.g.*, Exhibit D, John D. Finnerty, *Short Selling, Death*
 26 *Spiral Convertibles, and the Profitability of Stock Manipulation* (March 2005), at **37-39, 41, 43,

27
 28 ⁶ Former MiMedx CEO Petit was acquitted by the jury of the conspiracy charge. *See, Petit*, 2021 WL
 673461, at *11. The convictions are currently being appealed, 2nd Cir. No. 21-559, and are thus not final.

1 explaining how naked short sellers can camouflage their identity, intent, and trading activity. Such
 2 unlawful practices can have a devastating impact on a stock price. *Id.*

3 In the case at bar, Cohodes “voluntarily thrust [himself] into a discussion of public topics,”
 4 which alone provides a basis to strike the Complaint. *Brodeur v. Atlas Ent., Inc.* (2016) 248 Cal. App.
 5 4th 665, 676 (citing *Seelig v. Infinity Broad. Corp.* (2002) 97 Cal. App. 4th 798, 808 (granting anti-
 6 SLAPP motion on this basis); *Ingels v. Westwood One Broad. Servs., Inc.* (2005) 129 Cal. App. 4th
 7 1050, 1068 (same). The foregoing issues heavily impact not only publicly traded companies, but also
 8 investors nationwide, and are thus unquestionably matters of public concern, which bars the
 9 Complaint for this additional reason.

10 **C. The Common Interest Privilege Applies.**

11 The common-interest privilege would also bar any claims arising from any contractual
 12 relationships between Snowdy and parties who shared in interest in investigating abusive short sellers,
 13 as alleged by Cohodes. This privilege protects “communications made in good faith on a subject in
 14 which the speaker and hearer shared an interest or duty,” *Kashian*, 98 Cal. App. 4th at 914. *See also,*
 15 *Hui v. Sturbaum* (2014) 222 Cal. App. 4th 1109, 1119 (barring defamation action against investigator
 16 because “[p]arties in a business or contractual relationship have the requisite ‘common interest’ for
 17 the privilege to apply”) (citing *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426).
 18 There is no dispute that Cohodes alleges that Snowdy was “requested by the person[s] interested to
 19 give … information,” Cal.Civ.Code § 47(c), and the activity thus squarely falls within the common
 20 interest privilege. *See also, Jacques v. Bank of Am. Corp.*, 2016 WL 4548863, at *10 (E.D. Cal. Aug.
 21 31, 2016) (finding that “participating institutions [that reviewed allegedly defamatory investigative
 22 report] share a common interest in knowing if former employees may have caused or attempted to
 23 cause financial loss”).

24 **D. Cohodes’ Republication Theory Fails.**

25 Cohodes tries to artfully plead around the foregoing issues by suggesting Snowdy is liable for
 26 republication of his alleged findings through Catalyst/Callidus lawsuits against short sellers.⁷ *See,*

27 ⁷ Under this theory, the originator of an allegedly defamatory matter can be held “liable for each such
 28 repetition if he could reasonably have foreseen the repetition.” *Di Giorgio Corp. v. Valley Lab. Citizen* (Ct. App. 1968) 260 Cal. App. 2d 268, 273.

1 DE1, ¶¶ 37, 49, 125, 135. This doctrine does not apply, however, if the litigation privilege immunizes
 2 the original statement. *Id.* Nor could it apply if the “republication” is alleged to be a lawsuit. Under
 3 Cohodes’ novel proposition that a lawsuit following an alleged investigation and pre-litigation
 4 communications could be considered “republication,” the litigation privilege would be rendered
 5 meaningless. “[A]n attorney has a ‘nondelegable responsibility’ to ‘personally ... validate the truth
 6 and legal reasonableness of the papers filed, ... and ‘to conduct a reasonable factual investigation,’
 7 An attorney’s signature on a complaint is tantamount to a warranty that the complaint is well
 8 grounded in fact....” *In re Connetics Corp. Sec. Litig.*, 542 F. Supp. 2d 996, 1005 (N.D. Cal. 2008).
 9 Cohodes even alleges throughout the Complaint that the parties who prepared to litigate abusive short
 10 sellers intended to verify the purported statements. DE1, at ¶¶ 35, 42, 44, 52. Finally, Cohodes does
 11 not even allege which false/defamatory allegations were allegedly made against him in that litigation.

12 **E. Cohodes Cannot Establish Malice.**

13 Because issues of public interest and the common-interest privilege are qualified, Snowdy
 14 addresses Cohodes’ claims of malice, which must be shown to overcome conditional privileges.
 15 Should the Court agree that the litigation privilege bars the third and fourth causes of action, this
 16 inquiry is not relevant.

17 Cohodes’ conclusory allegations of malice fail to meet his burden. *See, e.g., Bowles v.*
18 Constellation Brands, Inc., 444 F. Supp. 3d 1161, 1178 (E.D. Cal. 2020) (rejecting conclusory
 19 allegations of malice). “Malice for purposes of the statute means a state of mind arising from hatred
 20 or ill will, evidencing a willingness to vex, annoy or injure another person.” *Kashian*, 98 Cal. App.
 21 4th at 914–15 (citation and internal quotation marks omitted). “[M]alice is not inferred from the
 22 communication.” *Id.* “Negligence is not malice. It is not sufficient to show that the statements in the
 23 report were inaccurate, or even unreasonable.” *Cabanas v. Gloodt Assocs.*, 942 F. Supp. 1295, 1301
 24 (E.D. Cal. 1996), *aff’d sub nom. Cabanas v. Gloodt Assocs., Inc.*, 141 F.3d 1174 (9th Cir. 1998). “If
 25 the occasion is conditionally privileged, if the defendant’s primary motive is the advancement of
 26 the interest which the privilege protects and if he speaks in good faith, the mere fact that he harbors
 27 ill will toward the plaintiff should be a neutral factor.” *Biggins v. Hanson* (1967) 252 Cal.App.2d 16,
 28 20.

1 Cohodes will be unable to present conclusive evidence that Snowdy's alleged investigations
 2 and findings were "objectively baseless, in that no reasonable person could believe that [Cohodes was
 3 not] involved in" short-and-distort schemes, such as Cohodes' "rigged" scheme, as described by
 4 California courts in *Overstock.com Inc., supra*, 151 Cal. App. 4th 688. *See, Tichinin v. City of Morgan*
 5 *Hill* (2009) 177 Cal. App. 4th 1049, 1072 (finding also that a good faith belief based on "rumors"
 6 refutes a finding of malice). Again, Cohodes was more than rumored to have orchestrated short and
 7 distort schemes in the past; indeed, the evidence showed just that in the *Overstock* case. His "bare
 8 assertion that [Snowdy's alleged statements] are false does not make it so, much less establish that
 9 [he] made the [alleged] statements maliciously." *Kashian*, 98 Cal. App. 4th at 932.

10 **F. Any Amendments to the Complaint Would Be Futile.**

11 The barring effect of the litigation privilege could not be cured by an amendment to the
 12 Complaint. All other allegations of defamation and false light invasion of privacy that are not
 13 specifically set forth under the third and fourth causes of action are also related to litigation activity,
 14 pursuant to the Complaint. *See, DE1*, at ¶¶35, 37 (alleging in connection with Guy's hearsay
 15 statements to the Catalyst/Callidus legal team that "Callidus was planning to file a lawsuit against the
 16 short sellers and others that were supposedly manipulating its securities."); *id.*, at ¶45 (alleging
 17 meeting with Catalyst lawyers); *id.*, at ¶49 (alleging as to Snowdy's alleged statements that "Callidus
 18 was planning to file a lawsuit against the short sellers and others that were supposedly manipulating
 19 its securities"); *id.*, at ¶51 (Cohodes admitting to "the subsequent Canadian litigation between
 20 Catalyst and short sellers it sued").

21 In paragraphs 52 and 53 of the Complaint, Cohodes does not allege that the emails Snowdy
 22 purportedly showed were mischaracterized. The only defamatory representations Cohodes alleges
 23 therein are the hearsay representations that Cohodes has "chinese (sic) backing" and that "anson
 24 partners (sic) Canada are the most dirty of the Wolfpack," however, even if these allegations were
 25 true, the hearsay communications⁸ between counsel purporting to interpret Snowdy's representations
 26 fail to state a claim because, in addition to being protected under the litigation privilege, the attorneys

27 ⁸ Some courts have observed the difficulty in basing a claim of defamation on alleged hearsay. *See, e.g., Walker v. Boeing Corp.*, 218 F. Supp. 2d 1177, 1193 n.9 (C.D. Cal. 2002) (collecting cases).

were discussing further investigating these alleged claims. *Cf., Laker v. Bd. of Trustees of California State Univ.* (2019) 32 Cal. App. 5th 745, 766 (no defamation where evidence showed investigation was still ongoing, notwithstanding allegation that investigation was an illegal “sham”).

Furthermore, these alleged statements are not reasonably susceptible of a defamatory interpretation in that they do not involve provable facts. A false publication is one that expresses provable facts, not merely opinions. *See, Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 604. In other words, “[a] statement must be provably false before there can be liability for defamation.” *Paterson v. Little, Brown & Co.*, 502 F. Supp. 2d 1124, 1134–35 (W.D. Wash. 2007) (citing, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20, 110 S. Ct. 2695, 2706 (1990); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.1992) (“a rip-off, a fraud, a scandal, a snake-oil job was mere hyperbole and, thus, protected opinion”); *Spelson v. CBS, Inc.*, 581 F.Supp. 1195 (N.D.Ill.1984) (expressions such as “unethical,” “cancer con-artists,” “cancer quacks,” and “fraud” were constitutionally protected statements of opinion)). “Whether a statement is reasonably susceptible of a defamatory interpretation is a question of law.” *Cnty. of Tuolumne v. Sonora Cnty. Hosp.*, 1 F. App'x 653, 654 (9th Cir. 2001) (holding that people’s opinions, feelings, beliefs, and concerns are not susceptible to defamatory interpretation) (citing *Smith v. Maldonado* (Ct.App.1999) 72 Cal.App.4th 637 (“Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood.”)).

To the extent Cohodes alleges defamation in connection with an anonymous email stating that “MiMedx was ‘on the right track’ in its lawsuit [against Sparrow] and purported to identify ‘criminal short sellers’ who were part of the ‘MDXG cabal’ and who “worked closely with Marc Cohodes,” DE1, at ¶64, this claim, too, fails. Not only does Cohodes not to allege, beyond his conclusory claims, why he believes the email to have been sent by Snowdy, but even if it were, for the sake of argument, these statements are not reasonably susceptible of a defamatory interpretation. *See* cases cited *supra*. Additionally, Cohodes, at most, alleges that the email privately expressed support for claims that had already been filed by the recipient of the email and could thus not be susceptible to defamatory interpretation for this independent reason, let alone constitute a “publication” or “publicity.”

1 The foregoing defects are not cured by Cohodes' vague and conclusory inference that Snowdy
 2 contributed to certain articles and posts by MiMedx about Cohodes. DE1, ¶¶66-71. Cohodes
 3 conflictingly alleges also that Snowdy was retained much later. DE1, at ¶¶65-66, 68; DE1-1. Cohodes
 4 does not even identify those alleged false statements, and the claim that Snowdy "shopped" purported
 5 recordings of Cohodes to his adversaries does not help him in this context because he does not allege
 6 that he (Cohodes) made false statements about himself in those recordings. DE1, ¶ 66. *See also*,
 7 Snowdy Declaration, showing that Cohodes' section 632.7 and Wiretap claims are false.

8 Finally, the inference in paragraph 72 that Snowdy took responsible part in the contents of the
 9 January 26, 2018 MiMedx article is contradicted by Exhibit A to the Complaint. DE1-1; DE1, at ¶72
 10 (MiMedx proposal predating its article by *days* and that the article mirrors MiMedx' own opinions).

11 In sum, any amendment to the Complaint would be futile, as it would have to necessarily
 12 contradict its current allegations or allege entirely new claims. "It is well-established that a plaintiff
 13 will not avoid the application of the anti-SLAPP statute by disguising the pleading as a 'garden
 14 variety' tort claim if the basis of the alleged liability is predicated on protected speech or conduct.
 15 Thus, a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of
 16 combining allegations of protected and nonprotected activity under the label of one 'cause of
 17 action.'" *Sparrow LLC v. Lora*, 2014 WL 12573525, at *3 (C.D. Cal. Dec. 4, 2014) (citing *Wang v.*
 18 *Wal-Mart Real Estate Bus. Trust* (2007) 153 Cal. App. 4th 790, 801-02). A complaint that must be
 19 stricken under the anti-SLAPP statute cannot be cured by an amendment. *See, Grant & Eisenhofer,*
 20 *P.A. v. Brown*, 2017 WL 6343506, at *9 (C.D. Cal. Dec. 6, 2017).

21 **G. This SLAPP Action Cannot Be Saved by Claims of Illegal Investigation.**

22 The argument that the anti-SLAPP statute does not bar an allegedly illegal "sham"
 23 investigation has recently been rejected in *Laker v. Bd. of Trustees of California State Univ.* (2019)
 24 32 Cal. App. 5th 745, under similar circumstances. Alleged "conduct that would otherwise be
 25 protected by the anti-SLAPP statute does not lose its coverage simply because it is alleged to have
 26 been unlawful." *Id.*, at 761-62. "If that were the test, the anti-SLAPP statute would be meaningless."
 27 *Id.* (citing *Hansen v. California Dept. of Corrections and Rehabilitation* (2008) 171 Cal.App.4th
 28 1537, 1545). To prevail on the showing that the defendants conduct was "illegal as a matter of law[,]

1 ... [t]he defendant [either] *must* concede the point, or the evidence *conclusively demonstrate* it, for a
 2 claim of illegality to defeat an anti-SLAPP motion at the first step.” *Id.* (emphasis added and in
 3 original) (citations omitted). Here, Snowdy neither concedes the point, nor could Cohodes present
 4 conclusive evidence to prove it as a matter of law. The evidence shows that Cohodes’ section 632.7
 5 and Wiretap claims are false. Snowdy Decl.

6 **VI. PRONG TWO: COHODES IS NOT LIKELY TO PREVAIL.**

7 Cohodes will be unable to demonstrate that he is likely to prevail under the second step of the
 8 anti-SLAPP analysis. Cohodes’ claims are premised on privileged litigation activity and seek to
 9 invade the attorney-client relationship and work product doctrine. Indeed, “[t]he litigation privilege
 10 is also relevant to the second step in the anti-SLAPP analysis in that it may present a substantive
 11 defense a plaintiff must overcome to demonstrate a probability of prevailing.” *TP Link*, 2020 WL
 12 3063956, at *8. Cohodes essentially concedes that his Complaint is based on a handful of documents
 13 recently unsealed containing alleged hearsay. DE1, ¶¶ 7, 52, 58-59, 94. If this were not so, Cohodes’
 14 claims would likely also be barred under the statutes of limitations.

15 It is well-settled that the attorney-client privilege extends to communications between a
 16 lawyer and investigator. *See, e.g., Nat.-Immunogenics Corp. v. Newport Trial Grp.*, 2017 WL
 17 10562991, at *3 (C.D. Cal. Sept. 18, 2017) (“Agents of attorneys are subject to the same attorney-
 18 client privilege as counsel”); *People v. Meredith* (1981) 29 Cal. 3d 682, 686. Similarly, “[t]he
 19 Supreme Court has held that the work product doctrine applies to documents created
 20 by investigators working for attorneys, provided the documents were created in anticipation of
 21 litigation.” *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (citing *United States v. Nobles*, 422 U.S. 225, 238–39, 95 S.Ct. 2160 (1975)). Consistent with the *Nobles* Court’s holding that
 22 a contrary rule would have a chilling effect on investigations and effective representation, California
 23 courts recognize “the intimidating effect on attorneys [and their agents] of facing an
 24 almost certain retaliatory proceeding,” if these privileges were not strictly observed. *Rubin*, 4 Cal. 4th
 25 at 1198. The evidence also reflects that recordings were made by the Royal Canadian Mounted Police,
 26 Snowdy, Decl., which would be protected under the law enforcement privilege.
 27

1 **VII. SNOWDY IS ENTITLED TO RECOVER ATTORNEYS' FEES AND COSTS.**

2 Under the anti-SLAPP statute, “a prevailing defendant on a special motion to strike shall be
3 entitled to recover his or her attorney's fees and costs.” Cal. Civ. Proc. Code § 415.16(c)(1). The
4 award of attorneys' fees and costs to a successful defendant is “mandatory.” *Ketchum v. Moses* (2001)
5 24 Cal.4th 1122, 1131; *Collins v. Allstate Indem. Co.*, 428 F. App'x 688, 690 (9th Cir. 2011). Thus,
6 should the Court grant this motion to strike, Snowdy respectfully requests that the Court order
7 Cohodes to pay all reasonable attorneys' fees and costs incurred in connection with the motion. In
8 that event, Snowdy would file a separately noticed motion to establish the amount of those fees and
9 costs. *See, Melbostad v. Fisher* (2008) 165 Cal. App. 4th 987, 992 (“In general, the party prevailing
10 on a special motion to strike may seek an attorney fees award through three different avenues:
11 simultaneously with litigating the special motion to strike, by a subsequent noticed motion, or as part
12 of a cost memorandum at the conclusion of the litigation.”).

13 **VIII. CONCLUSION**

14 For the foregoing reasons, Snowdy respectfully requests that the Court grant this Motion and
15 strike Cohodes' Third and Fourth Claims for Relief and the allegations on which they are based, and
16 award Snowdy his reasonable attorneys' fees and costs pursuant to further motion.

17 DATED: June 15, 2022

Respectfully Submitted,

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23 DERRICK SNOWDY

Certificate of Service

I hereby certify that on this 15th day of June, 2022, I electronically filed the foregoing **NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO C.C.P. § 425.16; AND REQUEST FOR ATTORNEYS' FEES AND COSTS (C.C.P. § 425.16(c)(1))** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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